Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1079

LUCY ELIZABETH BROOKS SCHANEFELT
Appellant,

v.

JOSEPH R. PARADISO,
Appellee,

MOTION TO DISMISS OR AFFIRM

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Appellant,

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JOSEPH R. PARADISO,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW MEXICO

MOTION TO DISMISS OR AFFIRM

The Appellee moves the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Supreme Court of the State of New Mexico, on the ground that the appeal does not present a substantial federal question.

THE STATUTE INVOLVED AND THE QUESTION PRESENTED

The statute whose validity is challenged in this appeal is Section 29-1-15, New Mexico Statutes Annotated, 1953 (hereafter "N.M.S.A., 1953"), which provides that in the event heirs

of a husband dying intestate are not found as provided in other sections of the New Mexico statutes dealing with descent and distribution, "the portion uninherited shall go to the heirs of the wife of the intestate if dead, according to like rules."[1] This appeal presents the question whether the limitation of this section to "heirs of the wife" results in an impermissible sex-based discrimination as to "the heirs of the husband", as Appellant claims to be, in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.[2]

THE PROCEEDINGS BELOW

Elizabeth J. Brooks, who resided and was domiciled in Hobbs, New Mexico, died March 27, 1973. She left a will naming Appellee, who was not related to her, as her sole devisee and legatee and as her executor (Tr. 1). Following transfer of Appellee's Petition for Probate of Will from the Probate Court of Lea County, New Mexico to the New Mexico District Court for Lea County (Tr. 4-5), the State of New Mexico filed its protest to the admission of the will to probate on the grounds that the "Decedent did not have the mental capacity to make a will" and that the will was the "result of Petitioner's [Appellee's] exercising of undue influence and fraud upon decedent." (Tr. 6). The issues presented by the petition and protest were tried before a jury, which rendered a verdict that the will was valid. Accordingly, on April 15, 1974 the will was admitted to probate, and Appellee was appointed executor of Mrs. Brooks' estate. (Tr. 7)

Elizabeth J. Brooks had no children, no heirs by adoption and no relatives by consanquinity. She had, however, been

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[1] The complete texts of Section 29-1-15 and other related sections of the New Mexico statutes are set forth in Appendix A to this Motion.

[2] As set forth on page 5 of Appellant's Jurisdictional Statement, the question presented by this appeal is stated to be whether:

> "Equal protection of the laws provided by the Fourteenth Amendment to the Constitution of the United States requires application of 53 N.M.S.A., Sec. 29-1-15 to heirs of deceased husbands as well as to heirs of deceased wives."

married to Frank J. Brooks, who predeceased her. Alleging that she was the daughter of Frederick Shelby Brooks, a brother of Frank J. Brooks, Appellant in September, 1974 filed a petition in the New Mexico District Court, Lea County, seeking revocation of the probate of Mrs. Brooks' will and the Letters Testamentary issued to Appellee and seeking appointment of Appellant as Administratrix of Mrs. Brooks' estate, on the same grounds as had been advanced by the State of New Mexico in its protest to the probate of Mrs. Brooks' will. (Tr. 12). In paragraph IX of her amended petition[3] Appellant claimed that as a relative by consanquinity to Frank J. Brooks in the collateral line, she was, under Section 29-1-15 N.M.S.A., 1953 "entitled to inherit as an heir of the deceased spouse of the intestate decedent." (Tr. 12).

Appellee moved to dismiss Appellant's petition on the ground that Appellant was not an heir of Elizabeth J. Brooks and, therefore, was not entitled to challenge the validity of Mrs. Brooks' will. In opposing Appellee's motion before the District Court Appellant argued that if Section 29-1-15 were construed to "restrict the inheritance to only heirs of the wife, heirs of a husband would be ineligible for inheritance due only to the sex of their ancestor" and that such a sex discrimination would violate the Equal Protection Clause. (Tr. 26-27). By an order filed November 14, 1974 the District Court dismissed Appellant's petition, finding that Appellant was not an heir of Elizabeth J. Brooks. (Tr. 16). While the District Court wrote no opinion, it had earlier, by letter dated October 31, 1974 to counsel for both parties, explained its reasoning thusly:

> "From 1927 to 1943 New Mexico had a law providing that where a widow died intestate holding community property previously belonging to her and her husband that such property in the event of no children descended one-half to

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[3] Appellant's initial petition was amended to allege that Appellant's brother, Perry Hershey Brooks, and a nephew, Federick Harrison Brooks, a living son of Appellant's deceased brother, Langley Harrison Brooks, were also entitled to inherit as heirs of the deceased spouse of Mrs. Brooks (Tr. 10; 15). Perry Hershey Brooks and Frederick Harrison Brooks were not parties to the proceedings below and are not parties in this Appeal.

her heirs and one-half to the husband's heirs. The repeal of this statute, which was Laws of 1927, Chapter 163, Section 1, definitely indicates a legislative intent to abandon the practice of having community property descend to one spouse and then revert to the heirs of both spouses." (Tr. 37).

In her appeal to the New Mexico Supreme Court Appellant again asserted her Equal Protection claims. The New Mexico Supreme Court affirmed the District Court without opinion. (Appellant's Brief, Appendix 101-102). This appeal followed.

ARGUMENT

THIS APPEAL PRESENTS NO SUBSTANITAL FEDERAL QUESTION AND SHOULD BE DISMISSED OR, IN THE ALTERNATIVE, THE JUDGMENT BELOW SHOULD BE AFFIRMED.

A. New Mexico's statutory scheme for the descent and distribution of property left by its deceased domiciliaries is entitled to great deference under this Court's decisions.

For more than 100 years this Court has consistently held that the disposition of property within its borders, whether intervivos, testamentary or by intestacy or any other mode, is a matter of state law and not a matter "placed under the control of Federal authority." *United Sates* v. *Fox,* 94 U.S. 315, 320-1 (1876); *Mager* v. *Grima* 8 How. 490, 493 (1850). Consistent with this principle, the Court has stressed that "the settlement and distribution of decedent's estates and the right to succeed to the ownership of realty and personalty are peculiarly matters of state law. . ." *Harris* v. *Zion's Savings Bank & Trust Co.,* 317 U.S. 447, 450 (1943). See also *United States* v. *Burnison,* 339 U.S. 87, 91-2 (1950).

Only recently the Court has had occasion to reaffirm these long-established principles in a case of particular application here. In *Labine* v. *Vincent,* 401 U.S. 532 (1971), the Court rejected a challenge under the Equal Protection Clause to a

Louisiana statute that denied an illegitimate daughter the right to inherit from her father who died intestate leaving only collateral heirs. Noting that Louisiana law regulated many of the property rights incident to family life and that Louisiana had a complex set of rules regarding the rights of illegitimate children, and that some of these rules discriminated in favor of some relations over others, the Court stated:

> "Some of these discriminatory choices are perhaps more closely connected to our conceptions of social justice or the ways in which most dying men wish to dispose of their property than the Louisiana rules governing illegitimate children. It may be possible that some of these choices are more 'rational' than the choices inherent in Louisiana's categories of illegitimates. But the power to make rules to establish, protect, and strengthen family life as well as to regulate the disposition of property left in Louisiana by a man dying there is committed by the Constitution of the United States and the people of Louisiana to the legislature of that State." 401 U.S. 532, at 538.

See also *Weber* v. *Aetna Casualty & Surety Co.,* 406 U.S. 164, 170 (1972).

New Mexico, too, has a comprehensive body of law regulating property rights incident to family life. A "community property" state, this law has deep and ancient roots, deriving many of its principles from Spanish law, see de Funiak, *Principles of Community Property,* Vol. 1, §53 (1943), and from other states long prior to the time New Mexico became a state. See *In re Gossett's Estate,* 46 N.M. 344, 129 P. 2d 56, 58 (1942). Included in this law is a comprehensive program dealing with descent and distribution, defining family relationships and providing for the inheritance of property. Art. 1, Chap. 29, N.M.S.A. 1953.[4]

Appellant would have the Court ignore this comprehensive body of law and focus on a single section, Section 29-1-15. This

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[4] The text of Article 1, §§29-1-1 through §29-1-23, as in effect at the time of Mrs. Brooks' death, is set forth in Appendix A.

section cannot be viewed in isolation, however, for as the New Mexico Supreme Court stated in *Gossett's Estate, supra,* these statutes "are in pari materia and should be construed together." 129 P. 2d 56, 58. So construed, it is evident that to the extent heirs of a wife are preferred under certain circumstances to the exclusion of heirs of a husband, such a preference is a permissible regulation by New Mexico of the inheritance of property of its domiciliaries.

Thus, Section 29-1-8 provides generally that "[U]pon the death of the wife, the entire community property, without administration, belongs to the surviving husband." Section 29-1-9, on the other hand, provides that "[U]pon the death of the husband one-half of the community property goes to the surviving wife and the other half is subject to the testamentary disposition of the husband, and in the absence of such disposition goes one-fourth to the surviving wife and the remainder in equal shares to the children of the decedent and further as provided by law." Two important conclusions may be drawn from these contrasting provisions. One is that had Frank J. Brooks been of a mind to do so, he could have provided for his heirs, including Appellant, leaving them up to one-half of the community property belonging to him and Elizabeth J. Brooks. Whether he did so does not appear from the record, but his opportunity to do so is no less important here than was the fact that the father in *Labine* v. *Vincent, supra,* had various opportunities open to him to provide for his illegitimate daughter even though he did not avail himself of them. 401 U.S. 532, 539.

The second conclusion is that if Section 29-1-15 were thought to work an impermissible sex-based discrimination against heirs of a deceased husband, surely Sections 29-1-8 and 29-1-9 work an even greater such discrimination against a wife and, ultimately, against her heirs. Indeed, throughout New Mexico's statutory scheme for descent and distribution there is preference for the heirs of the husband over those of the wife. Sections 29-1-13 and 29-1-14, for example, provide that if a

wife predeceases her husband and the couple die childless, the entire estate (including the wife's share of community property received by the husband by virtue of Section 29-1-8) goes to the husband's heirs, and none goes to the wife's heirs. Only if the husband has no heirs are heirs of the predeceased wife entitled to inherit from the intestate husband under Section 29-1-15. Clearly, in decrying an alleged neglect of the husband's heirs, Appellant is off base.

Appellant's challenge, in effect, is to the lack of symmetry in the New Mexico statutory scheme. The occasion for this lack of symmetry, at least as to community property, is mentioned in the District Court's letter of October 31, 1974 (Tr. 37). The District Court noted that in repealing Laws of 1927, Chapter 163, Section 1, the New Mexico legislature had evidenced "a legislative intent to abandon the practice of having community property descend to one spouse and then revert to the heirs of both spouses." Undoubtedly, this intent was formed as a result of the decision in *Harlan* v. *Sparks,* 125 F.2d 502 (10th Cir. 1942). In that case a husband and wife owned certain land as community property. The husband predeceased his wife, leaving his share of the property to his wife by will. On the wife's subsequent death, as the couple had had no children, and as the husband's parents had predeceased him, the husband's surviving sister, nieces and nephews were held to have become statutory or "forced" heirs who were entitled to a five-twelfths interest in the land and revenues derived from it.

Appellant would have this Court reimpose a scheme of distribution long ago rejected by the New Mexico legislature. It may well be, as this Court noted in *Labine* v. *Vincent, supra,* that New Mexico's policy cannot be said to be a perfect or even a desirable solution or the one that the Court would have provided for the inheritance of property from a woman whose husband has predeceased her. But like *Labine,* neither can the Court say that New Mexico "does not have the power to make laws for the distribution of property left within the State," and "there is nothing in the vague generalities of the Equal Protec-

tion [Clause] ... which empowers this Court to nullify the deliberate choice of the elected representatives of the people of" New Mexico. 401 U.S. 532, 539.

B. The New Mexico statutory scheme for inheritance of property does not violate the Equal Protection Clause.

Appellant's effort to supplant New Mexico's scheme for the inheritance of property left by a wife dying intestate after her husband rests on the theory that the limited focus of Section 29-1-15 works an invidious and unlawful discrimination based solely on sex, in violation of the Equal Protection Clause. Her Jurisdictional Statement cites only two cases in support of her theory, *Frontiero* v. *Richardson,* 411 U.S. 677 (1974), and *Stanley* v. *Illinois,* 405 U.S. 645 (1972). Neither is helpful to Appellant's cause.

In *Frontiero* the challenged federal statute provided the wife of a male serviceman with dependents' benefits, but afforded such benefits to the husband of a servicewoman only if he proved that the wife had supplied more than one-half of the husband's support. Finding that such different treatment was accorded for the sole purpose of achieving administrative convenience, and in reliance on the Court's decision in *Reed* v. *Reed,* 404 U.S. 71 (1971), the Court concluded that the statute violated the right to equal protection of the law secured by the Fifth Amendment. In *Stanley* the Court held that an Illinois statute that denied to an unwed father a hearing on his fitness as a parent, but granted such a hearing to all other parents whose custody of children was challenged by the State, was invalid under the Equal Protection Clause.

In *Reed* the Court held that the mandatory provisions of the Idaho probate code giving preference to men over women when persons of the same entitlement class applied for appointment as administrators of decedents' estates violated the Equal Protection Clause. Noting that while the Idaho statute preferred males, it did not deny letters of administration to women,

and that a large portion of estates in the United States were administered by women, the Court rejected the notion, relied on by the Idaho Supreme Court, that the avoidance of hearings as to the qualifications of competing applicants for letters of administration justified preference of one sex over another. The Court characterized this as "the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause . . .". 404 U.S. 71, 76.

While it is true, as Appellant notes at page 11 of her Jurisdictional Statement, that this Court in *Frontiero* agreed with the contention of the appellants there that "classifications based upon sex, like classifications based upon race, alienage, and national origin, are inherently suspect and must therefore be subjected to close judicial scrutiny", 411 U.S. 677, 682, the *Frontiero* case has no relevance to this cause. As the Court noted in *Schlesinger* v. *Ballard,* 419 U.S. 498, 507-510 (1975), both *Frontiero* and *Reed* involved overbroad generalizations about differences between the sexes based on administrative convenience and that alone.

It cannot be said that the New Mexico statute challenged by Appellant is one based on administrative convenience. It is rather one segment of a legislative effort to strike some balance as between the rights of heirs of a wife whose husband has predeceased her and the heirs of a husband. Given the considerable latitude permitted state legislatures in regulating the disposition of property upon death, as evidenced by the Court in *Labine* v. *Vincent* and the other cases cited at pages 4 and 5 of this motion, that effort is entitled to this Court's respect and neither *Frontiero* nor *Reed* suggest otherwise.

Nor does the Court's decision in *Stanley* aid Appellant. Given the preferred position that matters of family concern have occupied in the United States and in this Court's decisions, an effort to deprive an unwed father of custody of a child merely because of his unwed status, when all other parents whose custody was challenged were accorded a hearing as to their parental fitness, could hardly meet the mandate of the

Equal Protection Clause. But the alleged deprivation complained of by Appellant cannot rise to the dignity of that complained of by the father in *Stanley.*

Appellant's limited reliance on *Frontiero* and *Stanley* ignores the context in which those and other cases dealing with sex-based classifications have arisen. This Court's efforts to balance the competing considerations that come into play in any such legislative classification are hardly new. Almost seventy years ago, in *Muller* v. *Oregon,* 208 U.S. 412 (1908), this Court upheld an Oregon statute providing that females shall not work in certain establishments more than ten hours a day, as against claims that such a limitation violated the Equal Protection Clause. See also *Radice* v. *New York,* 264 U.S. 292 (1924).

Thirty years later, in *West Coast Hotel Co.* v. *Parrish,* 300 U.S. 379 (1937), this Court overruled *Adkins* v. *Childrens' Hospital,* 261 U.S. 525 (1923), and upheld a Washington statute providing for minimum wages for women even though it did not extend to men. Later, in *Goesaert* v. *Cleary,* 335 U.S. 464 (1948), the Court upheld, as against an Equal Protection challenge, a Michigan statute forbidding a female to act as a bartender unless she was the wife or daughter of a male owner of a liquor establishment. Finally, in *Hoyt* v. *Florida,* 368 U.S. 57 (1961), the Court upheld a Florida statute making jury duty voluntary for women and compulsory for men.

Frontiero, Reed and *Stanley* do not represent a retreat from the principles of these cases, and they cannot be construed as a complete rejection of any classification that is based on sex or, as here, on a classification that is not based on sex *per se,* but on the status of particular individuals who, by virtue of that status are of a particular sex. Indeed, several of this Court's decisions since *Reed* have upheld a variety of differences in treatment of the sexes against challenges under the Equal Protection Clause. In *Schlesinger* v. *Ballard, supra,* at page 9, the Court upheld different mandatory retirement ages for men and women naval

officers, while *Kahn* v. *Shevin,* 416 U.S. 351 (1974) the Court upheld a Florida statute granting widows a $500 annual property tax exemption not granted to men. Similarly, in *Forbush* v. *Wallace,* 341 F. Supp. 217 (M.D. Ala. 1971), aff'd. 405 U.S. 970 (1972), this Court affirmed, without opinion, the decision of a three-judge District Court upholding an Alabama law requiring women to assume their husband's surnames and to use those surnames in applying for drivers' licenses, while in *Williams* v. *McNair,* 316 F. Supp. 134 (D.S.C. 1970), aff'd 401 U.S. 951 (1971), the Court affirmed, without opinion, the decision of a three-judge District Court sustaining South Carolina's limit of admissions to women in one of that state's eight state-supported colleges.

Labine, Ballard, Kahn, Forbush and *McNair* and the comparable decisions that preceded them are significant for their consistency. Unlike *Reed* and *Frontiero,* where the challenged classifications sought to treat as dissimilar persons whose interests were similar, those cases involved legitimate legislative objectives in the challenged classifications, and the means chosen to accomplish those objectives were found to be reasonable and consistent with the mandate of the Equal Protection Clause.

Section 29-1-15 of N.M.S.A. 1953 is equally consistent with these cases. Construed in *pari materia* with the remaining New Mexico statutes relating to descent and distribution, the cited cases dictate that Appellant's efforts to expand Section 29-1-15 to cover heirs of a deceased husband must fail. See *McDonald* v. *Board of Election,* 394 U.S. 802, 809 (1969).

C. Other factors demonstrate that this case does not present a substantial federal question and that further argument is not necessary.

While the foregoing discussion necessarily focused on New Mexico's statutory provisions in cases of intestacy, it is significant that Elizabeth J. Brooks did leave a will. After a jury trial on the protest of the State of New Mexico, the will was found to

be valid and was admitted to probate, and Letters Testamentary were issued to Appellee. A reversal of the New Mexico Supreme Court at best would only permit Appellant to raise these same issues that have already been decided once after a jury trial.

Moreover, while Appellant suggests that her appeal presents questions of great public significance, its future significance, even to potential heirs situated similarly, is minimal. Shortly after the death of Elizabeth J. Brooks the challenged statute was amended to provide essentially the same treatment for heirs of a deceased husband as Appellant seeks from this Court.[5] Therefore, a decision in Appellant's favor would benefit only her (and possibly Perry Hershey Brooks and Frederick Harrison Brooks; fn. 3 *supra*). This Court has traditionally been reluctant to decide cases of benefit only to the litigants before it. *Rudolph* v. U.S., 370 U.S. 269 (1962); *Rice* v. *Sioux City Cemetery,* 349 U.S. 70 (1955). In *Rice,* after an affirmance of the State Court by an equally divided Court, this Court granted a petition for a rehearing, vacated the judgment of affirmance and dismissed the grant of certiorari as having been improvidently granted. The factor that motivated the Court towards this unusual result was the existence of an Iowa statute (passed after the conduct that gave rise to the Petitioner's challenge) that precluded the question before the Court from rising again.

Further, while Appellant, in effect, seeks an affirmative ruling that Section 29-1-15, N.M.S.A. 1953 includes her as an heir, this Court has recognized that it cannot give relief in

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[5] As amended, Section 29-1-15 provides:

"29-1-15. *Inheritance by heirs of spouse.* If heirs of the intestate are not found as under section 29-1-14 NMSA 1953, the portion uninherited shall go to the heirs of the deceased spouse of the intestate according to like rules. If the intestate has had more than one deceased spouse the estate shall be equally divided between the heirs of all such spouses, taking by right of representation." (N.M. Laws 1973, ch. 276, §6).

matters of legislative concern and as to which the legislature is free to make choices other than that sought by the litigant before the Court. For example, relying on its decision in *Reed* v. *Reed, supra* at page 8, this Court, in *Stanton* v. *Stanton,* 421 U.S. 7 (1975), declared invalid under the Equal Protection Clause a Utah Statute providing that girls reached majority at age 18 while boys only reached majority at age 21. But the Court recognized that its decision did not finally resolve the controversy, for it was up to the Utah Legislature to determine the age limit to be applied to both males and females.

A decision in Appellant's favor here similarly would not end the controversy. As the determination of who may be heirs of a decedent is a matter for the New Mexico Legislature, it would then be for the New Mexico Legislature to determine what sort of distribution scheme should replace Section 29-1-15, N.M.S.A. 1953.

Finally, the consequences of a decision that Section 29-1-15, N.M.S.A. 1953 includes not only the heirs of the wife of a predeceased husband but the heirs of the husband also would create the very chaos that the New Mexico Legislature sought to avoid in its comprehensive program for the descent and distribution of property upon death. It would create a cloud on all property, real and personal, that has passed by will or intestacy since Section 29-1-15 was passed as Section 1417, New Mexico Consol. Laws 1884. For if Appellant, as an heir of a predeceased husband of Mrs. Brooks, has standing to challenge Mrs. Brooks' will under this statute, there undoubtedly are vast numbers of persons, and their heirs, who, since 1884, might claim similar status. Aside from the quiet title suits, will contests and other litigation that surely could be expected to follow, the detrimental effect on those holding property in New Mexico could be incalculable.

It was to avoid this sort of uncertainty and to secure the prompt and efficient transfer of property from decedents to their heirs and other devisees and legatees that this Court has traditionally accorded the States wide latitude in determining who may inherit property and upon what terms and conditions. This is not a case in which to retreat from those long adhered to principles.

CONCLUSION

WHEREFORE, Appellee respectfully submits that this Appeal does not present a substantial federal question and no further argument is needed; Appellee therefore moves the Court to dismiss the Appeal or, in the alternative, to affirm the judgment of the Supreme Court of the State of New Mexico.

Respectfully submitted,

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NEW MEXICO STATUTES ANNOTATED, 1953
CHAPTER 29
DESCENT AND DISTRIBUTION

Article 1. Relationships and Division, 29-1-1 to 29-1-23.

ARTICLE I

Relationships and Division

29-1-1. Relationship by consanguinity—Definition—Lines.—The relation of consanguinity being the relation or connection which exists between persons united by the ties of blood shall be considered in the direct and collateral lines, for civil puposes, in the computation thereof.

29-1-2. Direct line—Ascendants and descendants—Degrees.—Relationship in the direct line, counted from fathers to sons and remoter descendants, shall be computed by the number of persons begotten, and these are degrees not counting the trunk: for example, the father is the trunk, the son is the first degree, the grandson the second degree, the second grandson the third degree, the third grandson the fourth degree, the fourth grandson the fifth degree, the fifth grandson the sixth degree, and so on with the rest, and these are called descendants. But from this point, counting upwards they are called ascendants, so the last is called son, in respect to his predecessor, and such predecessor is called father, and going upward, the one [1] that comes next in order is grandfather, second grandfather, third grandfather, fourth grandfather.

29-1-3. Collateral line—Regular and irregular—Degrees.—Relationship in the collateral line in its computation is reckoned by the number of persons begotten, not counting the trunk, to which they are referred as having descended from it, but which are separate laterally, as branches pendant from

that trunk; for example, brothers are of the second degree, because they are two [2] persons, begotten by and descended from the same trunk, or, if the number of brothers be greater, the comparison is always one [1] with another; the sons of these are of the fourth degree, as being four [4] persons separate from each other, but from the same trunk, those that follow are of the sixth degree, and the next of the eighth degree. Therefore, counting in even series, as has been shown, they go on increasing two [2] by two [2] ad infinitum, and this is the regular collateral line. But if, for example, one [1] of the second degree, be considered in reference to one [1] of the fourth degree, this will be the irregular collateral line.

29-1-4. Relationship by affinity.—The relation of affinity is contracted by the union of man and woman in the bonds destined for the propagation of the species, and its computation is in the same order as the relation of consanguinity in respect to the direct line, in descendants and ascendants, and in respect to the collateral line; and it extends only to the eighth degree of civil computation, if the union be by legitimate matrimony, and to the fourth, if the union be without matrimony, it being observed that the man and woman only, who contracted the union, are individually connected by affinity with the blood relations of the other party, and those blood relations are connected by affinity with the consort of their blood parent; and this relationship shall only be valid for the civil purposes which may be explained in the laws and acts of individuals of the human race.

29-1-5. "Division of inheritance" defined.—A division of an inheritance is the distribution of the property inherited among the heirs, giving to each the portion he is entitled to, according to the will of the deceased, or in the manner scribed by law.

29-1-6. Who may demand division of inheritance.—The following persons may demand a division of the inheritance:

FIRST. All and each of the heirs or participators in the inheritance of the deceased, over twenty-two [22] years of age, and capable of managing their property.

SECOND. Minors or incapable persons, such as the insane, idiots and others, through their guardians and protectors, to be appointed by the probate judge if not otherwise provided.

THIRD. The widow of the deceased, although not an heir, in order to recover her acquests during marriage, and other rights to which she may be entitled.

FOURTH. A person pretending to be a participator or heir after having been declared such by law.

FIFTH. A stranger, who, before the division of the property, may have purchased from one [1] of the heirs his portion of the inheritance.

SIXTH. The state treasurer, should he be entitled to receive such inheritance.

29-1-7. Absent heirs.—When any of the heirs are absent, those being present may demand a division of the property, but the judge shall notify the absentee with [within] sufficient time to allow him to express his wishes, and should he not appear in a reasonable period of time, according to the opinion of the administrator or executor, the distribution shall take place, appointing an agent, should none be provided by the absentee, who, on account and risk of his principal, shall take charge of his interests, receiving for his services the compensation the probate judge may deem proper.

29-1-8. Death of wife—Community property.—Upon the death of the wife, the entire community property, without administration, belongs to the surviving husband, except such portion thereof as may have been set apart to her by a judicial decree, for her support and maintenance, which portion is subject to her testamentary disposition, and in the absence of such disposition, goes to her descendants, or heirs, exclusive of her husband.

29-1-9. Death of husband—Community property.—Upon the death of the husband one-half of the community property goes to the surviving wife and the other half is subject to the testamentary disposition of the husband, and in the absence of such disposition goes one-fourth to the surviving wife and the remainder in equal shares to the children of the decedent and

further as provided by law. In the case of the dissolution of the community by the death of the husband the entire community property is equally subject to his debts, the family allowance and the charge and expenses of administration.

29-1-10. Inheritance by surviving spouse and children.—Subject to the provisions of sections 18-10 and 18-11 [29-1-8, 29-1-9] of this article when any person having title to any estate, not otherwise limited by marriage contract, dies without disposing of the estate by will, it is succeded to and must be distributed subject to the payment of his debts in the following manner: One-fourth thereof to the surviving husband or wife and the remainder in equal shares to the children of decedent and further, as provided by law.

29-1-11. Decedent's exempt personalty goes to widow and remains exempt.—When the decedent leaves a widow, all personal property which in his hands as the head of a family would be exempt from execution, after being inventoried and appraised, shall be set apart to her as her property in her own right, and shall be exempt in her hands as in the hands of the decedent.

29-1-12. Inheritance by heirs of deceased child.—If any one [1] of the childre. of the intestate be dead, the heirs of such child shall inherit his share in accordance with the rules herein prescribed in the same manner as though such child had outlived his parents.

29-1-13. Dying without issue—Inheritance by widow or parents.—If the intestate leave no issue, the whole of his estate shall go to his wife; if he leaves no wife, the portion which would have gone to her shall go to his parents. If one [1] of his parents be dead, the portion which would have gone to such deceased parent, shall to to the surviving parent.

29-1-14. No issue or widow and both parents dead—Inheritance by heirs of parents.—If both parents be dead, the portion which would have fallen to their share, by the above rule, shall be disposed of in the same manner as if they had outlived the intestate, and died in the possession and ownership

of the portion thus falling to their share; and so on through the ascending ancestors and their issue.

29-1-15. Inheritance by heirs of wife.—If heirs are not thus found the portion uninherited shall go to the heirs of the wife of the intestate, if dead, according to like rules, and if he has had more than one [1] wife, who died, it shall be equally divided between the heirs of all such wives, taking by right of representation.

29-1-16. Posthumous children unprovided for by their father's will.—Posthumous children unprovided for by the father's will shall inherit the same interest as though no will had been made. The amount thus allowed to a posthumous child, shall be taken ratably from the interests of heirs, devisees and legatees, but the will for this reason shall not be otherwise revoked.

29-1-17. Inheritance by and from adopted child.—Whenever a child has been legally adopted, such child shall inherit from the adopting parents, and each of them, and the adopting parents and each or either of them shall inherit from the adopted child, to the same extent as if he were a natural child of the adopting parents. For all inheritance purposes without exception the adopted child shall be considered a natural child of the adopting parents and in the event of the death of such adopted child, his estate shall ascend, decend and be distributed as is otherwise provided by law for natural born children of the same family, all to the exclusion of the natural or blood parents of such child, Provided however, where one [1] of the natural parents be united in bonds of matrimony to the other adopting parent then in such event the rules of inheritance as above set out shall attach as if said child were the natural child of both such parents.

29-1-18. Illegitimate child—Inheritance by and from—Evidence of recognition by the father.—Illegitimate children shall inherit from the mother and the mother from the children; they shall inherit from the father whenever they have been recognized by him as his children, in writing, by an instrument signed by the reputed father and must be such as to show upon its face that it was so signed with the intent of recognizing such

children as heirs; Provided, that in event of loss or destruction of such an instrument, declarations of deceased persons shall be admissible to prove such loss or destruction as well as the existence and contents thereof and, whether or not lost or destroyed, and the genuineness of such an instrument, but such declarations shall be corroborated by proof of general and notorious recognition of such children by the father.

29-1-19. Father inheriting from illegitimate child.—Under such circumstances, if the recognition of relationship has been mutual, the father may inherit from his illegitimate children, but in thus inheriting from an illegitimate child, the mother and her heirs take preference of the father and his heirs.

29-1-20. Legitimation by marriage of parents—Illegitimate children become legitimate by the marriage of their parents.

29-1-21. Escheats.—If there be property remaining uninherited, it shall be escheat to the state.

29-1-22. Provisions concerning widows apply to widowers.—All provisions of the law relating to wills and to estates of deceased persons made in regard to the widow of a deceased husband, shall be applicable to the surviving husband of a deceased wife.

29-1-23. Courtesy and dower abolished.—No estate is allowed the husband as tenant by courtesy upon the death of his wife, nor is any estate in dower allotted to the wife upon the death of her husband.

PROOF OF SERVICE

I, C. J. HEAD, counsel for Joseph R. Paradiso, Appellee herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on April 29, 1976, I served three copies of the foregoing Motion to Dismiss or Affirm on opposing party thereto, Lucy Elizabeth Brooks Schanefelt, Appellant, by mailing three copies in a duly addressed envelope, with airmail postage prepaid, to Warren F. Reynold, Esq., counsel for Lucy Elizabeth Brooks Schanefelt, Post Office Box 638, Hobbs, New Mexico 88240.

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